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In The
Supreme Court of the United States

MARTIN GJIDODA,
Petitioner,

v.

ROBIN BAKER, FIELD OFFICE DIRECTOR, IMMIGRATION AND CUSTOMS ENFORCEMENT,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI
with Appendix

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QUESTIONS PRESENTED FOR REVIEW

1. Did Congress intend to provide for federal court review of deportation orders entered before the enactment of the REAL ID Act of 2005 where such challenges were not brought until after the enactment of the Act?

2. Does the retroactive elimination of habeas review of Petitioner's deportation order without providing an adequate, or any, substitute violate the Suspension Clause?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Martin Gjidoda respectfully petitions that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Sixth Circuit entered in this case on August 21, 2008. When the Board of Immigration Appeals ("BIA") ordered Mr. Gjidoda deported, he sought review in the Sixth Circuit but that court denied his petition on jurisdictional grounds because of his conviction for a disqualifying offense. His remedy at the time was to file a petition for writ of habeas corpus but he was not in the physical custody of the Immigration and Naturalization Service ("INS").

On May 11, 2005, the REAL ID Act, Pub. L. No. 109-13, Div. V, 119 Stat. 231, 302-23 (2005) ("RIDA") eliminated habeas review of deportation orders. In its place, criminal aliens could seek judicial review of their deportation orders. However, the RIDA failed to account for noncitizens, such as Mr. Gjidoda, who suddenly lost their right to seek habeas review but who were beyond the 30 day limitations period for seeking judicial review. Congress intended and the Suspension Clause requires a forum for Mr. Gjidoda's challenge to his deportation order.

OPINIONS BELOW

The opinions of the Sixth Circuit Court of Appeals, App., *infra*, A1 and E1, are unreported. The opinion of the Board of Immigration Appeals, App., *infra*, B1, is unreported. The decision of the Immigration Judge, App., *infra*, C1, is unreported.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit, App., *infra*, A1, was entered on August 21 2008. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

The Suspension Clause, U.S. Const. art 1, § 9, cl. 2, provides:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion of Invasion the public Safety may require it.

8 U.S.C. § 1182(h) provides, in relevant part:

> No waiver shall be provided under this subsection in the case of an alien who haws been convicted of ... murder .... No waiver

> shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony ... .

STATEMENT

(i) Nature of the Case

This case presents two important and recurring questions. The first is whether Congress intended to eliminate all possibility of federal court review of Mr. Gjidoda's deportation order. Congress intended for the RIDA to provide criminal and noncriminal aliens alike with one bite at the judicial review apple by eliminating habeas review and replacing it with judicial review. Given the complexity of the immigration laws, Congress unintentionally failed to account for noncitizens such as Mr. Gjidoda, who retroactively lost the right to seek habeas review but were too late to seek judicial review.

If the answer to the first question is yes, then the second question is whether that would violate the Suspension Clause. The Sixth Circuit's

decision leaves a small group of noncitizens without any avenue for challenging their deportation orders.

(ii) Factual Background

Mr. Martin Gjidoda is a 66-year-old citizen of the former Yugoslavia. He was admitted to the United States as a B-2 nonimmigrant visitor on March 16, 1985. After arriving in the United States, he married File Gjidoda, who was at the time a lawful permanent resident. Mrs. Gjidoda became a naturalized United States citizen and then filed a Petition for Alien Relative (Form I-130) on behalf of her husband. The INS[1] approved her I-130 petition November 26, 1985. When the INS lost this file, Mrs. Gjidoda filed a second I-130 petition, which the INS approved on December 19, 1994. (R. 1, I-130 Approval Notice, tab E).

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[1] The Homeland Security Act abolished the INS effective March 1, 2003 and transferred its functions to various agencies within the Department of Homeland Security. Pub. L. No. 107-296, 116 Stat. 2135, 2192. The BIA and the Immigration Court remain part of the Department of Justice. This petition refers to the INS with respect to actions it took during its existence and to the appropriate agencies for events occurring after March 1, 2003.

Based on the approved I-130 petition, Mr. Gjidoda applied to adjust his status to that of a lawful permanent resident. On August 30, 1995, the INS denied his application. (R. 1, Denial of Adjustment of Status, tab A). The INS concluded that Mr. Gjidoda's conviction for murder in Yugoslavia was a crime involving moral turpitude and an aggravated felony.[2] *Id.* Therefore, the INS concluded, he was ineligible for a waiver of inadmissibility. *Id.*; 8 U.S.C. §§ 1182(a)(2)(A)(i)(I), (h).

(iii) Agency Proceedings

The INS placed Mr. Gjidoda in deportation proceedings in Detroit, Michigan, where he renewed his adjustment of status application. 8 C.F.R. § 1245.2(a)(5)(ii). The Immigration Judge ("IJ") found him ineligible for a waiver of inadmissibility and ordered him deported on July 27, 1999. (R. 1, Oral Decision, tab B) (App. D1). The IJ concluded that he was inadmissible because

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[2] Mr. Gjidoda was convicted of violating Article 135 of the Yugoslav Criminal Code. This statute provides that "whoever takes another man's life shall be punished by strict imprisonment for not less than five years." (R. 1, Criminal Code, tab H). The punishment depends on the identity of the victim, the perpetrator's motive, or the circumstances of the crime. *Id.*

he was convicted a crime involving moral turpitude. *Id.*; 8 U.S.C. § 1182(a)(2)(A)(i)(I). The IJ held that the Yugoslavian conviction was equivalent to either second-degree murder, in violation of 18 U.S.C. § 1111, or voluntary manslaughter, in violation of 18 U.S.C. § 1112(a). (R. 1, Oral Decision, tab B). The IJ then concluded that Mr. Gjidoda was ineligible for a waiver of inadmissibility under 8 U.S.C. § 1182(h), because he had been convicted of an aggravated felony. (R. 1, Oral Decision, tab B).

Mr. Gjidoda timely appealed to the BIA. The BIA rejected the IJ's holding that Mr. Gjidoda was ineligible for a waiver of inadmissibility based on his classification as an aggravated felon, since only lawful permanent residents convicted of this type of crime are ineligible. (R.1, BIA Decision, tab C) (App. C1); 8 U.S.C. § 1182(h). However, the BIA found that Mr. Gjidoda's conviction qualifies as a conviction for "murder" under the INA, rendering him ineligible for a waiver of inadmissibility. (R. 1, BIA Decision, tab C).

(iv) Petition for Review

Mr. Gjidoda timely petitioned for review to the Sixth Circuit. The Court dismissed his petition

for review on October 22, 2002. Gjidoda v. Ashcroft, 48 Fed. Appx. 982, 2002 WL 31388782 (6th Cir. Oct. 22, 2002) (App. E1). The court lacked jurisdiction over Mr. Gjidoda's petition because of his conviction for a crime involving moral turpitude. Id. at *1-2; Section 309(c)(4)(G) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208. The Court did not reach the question of whether Mr. Gjidoda was convicted of "murder" or whether he is eligible for a waiver of inadmissibility.[3]

(v) Habeas Proceedings

At the time of the Sixth Circuit's 2002 decision, Mr. Gjidoda could have challenged the BIA's decision through a petition for writ of habeas corpus. There was no time limit for filing a habeas petition and Mr. Gjidoda was not detained. On May 11, 2005, the RIDA provided criminal aliens with the right to seek judicial review of legal issues

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[3] Mr. Gjidoda is not challenging the classification of his conviction as one that involves moral turpitude. Rather, he asserts that he was not convicted of "murder" and therefore remains eligible for a waiver of inadmissibility under 8 U.S.C. § 1182(h). The IJ found him ineligible for this waiver for the wrong reasons. The BIA found him ineligible for this waiver on a ground that was not addressed by either the IJ or the parties.

relating to a deportation order through a petition for review. 8 U.S.C. § 1252(a)(2)(D). Given this alternative avenue for judicial review, the act sought to eliminate habeas review of deportation orders.

Because it was too late for him to file a petition for review, he filed a habeas petition with the Eastern District on August 17, 2006. (R. 1, Petition). The District Court denied the petition on May 31, 2007 pursuant to the RIDA and 8 U.S.C. §§ 1252(a)(5), (b)(9). App. B1.

(vi) The Sixth Circuit's Decision

Mr. Gjidoda timely appealed from the district court's decision. On August 21, 2008, the Sixth Circuit denied the appeal. Gjidoda v. Mukasey, No. 07-3499 (6th Cir. Aug. 21, 2008) (App. A1). The court found that the RIDA precluded review of Mr. Gjidoda's habeas petition.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's decision conflicts with the decisions from other circuits that construed the RIDA to provide an opportunity for noncitizens such as Mr. Gjidoda to seek review of their deportation orders. See Singh v. Mukasey, 533

F.3d 1103 (9th Cir. 2008); Ruiz-Martinez v. Mukasey, 516 F.3d 102 (2d Cir. 2008); Kolkevich v. Attorney General, 501 F.3d 373 (3d Cir. 2007). Although the RIDA created an adequate substitute for habeas corpus for some noncitizens, the Sixth Circuit's interpretation of the Act would deprive a limited class of noncitizens of any substitute.

The deportation order entered by the agency cannot withstand scrutiny and despite Mr. Gjidoda's diligent efforts to timely challenge this order, he was never given an opportunity to do so.

I. The Agency Unlawfully Deprived Mr. Gjidoda Of An Opportunity To Apply For A Waiver Of Inadmissibility

The BIA erroneously concluded that Mr. Gjidoda's foreign conviction qualifies as a conviction for "murder" under immigration law. At minimum, the BIA should not have made this factual finding sua sponte and should have instead allowed the parties to brief this issue. The IJ never addressed issue.[4]

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[4] Mr. Gjidoda exhausted this issue. The IJ's ruling was favorable to him and the BIA sua sponte decided the issue against him, without giving him an opportunity to respond. The Sixth Circuit could not reach this question because of Mr. Gjidoda's status as a criminal alien.

Mr. Gjidoda was lawfully admitted to the United States as a nonimmigrant. As the beneficiary of an approved immigrant visa petition filed by his United States citizen wife, Mr. Gjidoda was eligible to apply for lawful permanent residency if he is otherwise admissible. 8 U.S.C. § 1255(a).

Mr. Gjidoda is inadmissible because of his conviction for a crime involving moral turpitude, as the Sixth Circuit found. 8 U.S.C. § 1182(a)(2)(A)(i)(I); Gjidoda, 48 Fed. Appx. at *1-2 (Add. E1). Most noncitizens convicted of a crime involving moral turpitude are eligible for a waiver of that ground of inadmissibility. 8 U.S.C. § 1182(h). Several classes of noncitizens who are ineligible for this waiver, including (1) noncitizens convicted of "murder," and (2) lawful permanent residents convicted of aggravated felonies. *Id.*

The IJ found, and the parties did not dispute, that his conviction was analogous to a conviction for either "voluntary manslaughter" or "murder." (R. 1, Oral Decision, tab B). She believed that because Mr. Gjidoda was convicted of an aggravated felony, he was statutorily ineligible for a waiver of inadmissibility. *Id.*

On appeal, the BIA rejected the IJ's reason for finding Mr. Gjidoda ineligible for a waiver of inadmissibility. Aggravated felons are eligible for a waiver of inadmissibility under 8 U.S.C. § 1182(h) unless they are lawful permanent residents. Because Mr. Gjidoda had never held this status, the fact that his conviction is classifiable as an aggravated felony did not preclude him from applying for a waiver. (R. 1, BIA Decision, tab C); see also Latu v. Ashcroft, 375 F.3d 1012, 1019-1021 (10th Cir. 2004).

At that point, the BIA should have remanded because it reversed the sole ground for the IJ's decision. Contrary to its own regulations, it went made the factual finding that Mr. Gjidoda's foreign conviction constitutes a conviction for "murder." (R. 1, BIA Decision, tab C). The BIA is an appellate body and generally cannot make findings of fact. 8 C.F.R. § 1003.1(d)(3). Moreover, since the parties did not address this issue because they accepted the IJ's findings, the BIA should at least have allowed them to brief the issue.

The government, as the party alleging the Mr. Gjidoda was convicted of "murder," has the burden of proving the foreign law. Matter of Soleimani, 20 I. & N. Dec. 99 (BIA 1999); Francis v.

Gonzales, 442 F.3d 131(2d Cir 2006); Menghesha v. Gonzales, 440 F.3d 201, 206 n.2 (4th Cir. 2006). The government did not submit any proof that Mr. Gjidoda's foreign conviction contained the same or similar elements as a conviction for "murder" under 18 U.S.C. § 1111. In fact, the IJ concluded that Mr. Gjidoda's foreign conviction could have been equivalent to a federal conviction for murder *or* manslaughter. (R. 1, Oral Decision, tab B).

The Immigration and Nationality Act ("INA") does not define "murder." When the INA does not define the criminal conduct that gives rise to immigration consequences, the courts should apply a federal definition to promote national uniformity. Matter of Rodriguez-Rodriguez, 22 I. & N. Dec. 991, 995 (BIA 1999); Gonzales-Gomez v. Achim, 441 F.3d 532 (7th Cir. 2006); Lennon v. INS, 527 F.2d 187 (2d Cir. 1975).

Federal law defines "murder" as the "unlawful killing of a human being with malice aforethought." 18 U.S.C. § 1111. The penalty for murder varies based on the victim and other aggravating factors. *Id.* Black's Law Dictionary, Sixth Edition, defines "murder" as the "unlawful killing of a human being by another with malice aforethought, either express or implied."

In contrast to federal law, Article 135 of the Yugoslav Criminal Code does not require proof that the perpetrator acted with "malice aforethought." To the contrary, it punishes "whoever takes another man's life," with punishment depending on the circumstances of the commission of the act, the motive of the perpetrator, or the occupation of the victim. Article 135(1) and (2) (R. 1, Criminal Code, tab H). Although the statute is entitled "murder," it is clear from the text of the statute that it encompasses many acts which would not fall under 18 U.S.C. § 1111.

To the extent that Article 135 is divisible, the IJ and BIA were limited to reviewing the record of conviction to determine if Mr. Gjidoda was convicted under the portion analogous to a federal murder conviction. The record of conviction is the "statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." Shepard v. United States, 544 U.S. 13, 16-17 (2005). To the extent that these documents were in the administrative record, there is nothing to show that Mr. Gjidoda's conviction, for what amounted to a crime of passion and imperfect self-defense, would have been treated as "murder" in the United States.

Not only did the government not prove that Mr. Gjidoda's conviction was for "murder," but it did not prove that the conviction was even admissible in deportation proceedings. The BIA will not rely on a conviction that was entered in violation of basic due process protections to support a charge of deportability or inadmissibility. Matter of Eslamizar, 23 I. & N. Dec. 684 (BIA 2004) (a conviction obtained pursuant to a statute permitting a conviction under less then a reasonable doubt standard is not a "conviction" under the INA). The Court has cautioned against the use of foreign convictions because of a possibility that the foreign criminal procedures are "inconsistent with an American understanding of fairness." Small v. U.S., 544 U.S. 385, 388-91 (2005). Thus, unless Congress specifically provides for the use of foreign convictions, the phrase "any" conviction refers to domestic convictions. Id.; see also Rosales-Pineda v. Gonzales, 452 F.3d 627, 632 (7th Cir. 2006) (recognizing that government faces higher burden of proof in establishing the existence, and elements of, a foreign conviction); Francis, 442 F.3d at 143-44.

Section 1182(a)(2)(A)(i)(I) does not specifically refer to foreign convictions. Given the presumption set forth in Small, *supra*, this

omission cannot be overlooked. Elsewhere in the INA, Congress specifically provided for the use of foreign convictions. See, e.g., 8 U.S.C. § 1101(a)(43) (foreign conviction can be an aggravated felony if the noncitizen was discharged from prison within the preceding 15 years); 8 U.S.C. § 1182(a)(2)(A)(i)(II), and 8 U.S.C. § 1227(a)(2)(B)(i) (controlled substance convictions).

The agency should have been given an opportunity to make findings of fact and conclusions of law, after providing the parties an opportunity to brief the issue, as to whether Mr. Gjidoda's foreign conviction constitutes a conviction for "murder" INS v. Ventura, 537 U.S. 12, 16-18 (2002).

II. Congress Did Not Intend, And The Suspension Clause Does Not Permit, The Complete Elimination Of Federal Court Review Over Mr. Gjidoda's Deportation Order

The Sixth Circuit's decision has left him without an opportunity to challenge the BIA's erroneous deportation order. The Constitution guarantees the Writ of Habeas Corpus and it cannot be suspended except where "in Case of Rebellion or Invasion the Public Safety may require

it." U. S. Const. art. 1, § 9, cl. 2. The "writ of habeas corpus has served as a means of reviewing the legality of executive detention, and it is in that context that its protections have been strongest." INS v. St. Cyr, 533 U.S. 289, 300 (2001).

Through the RIDA, Congress sought to streamline, not eliminate, federal court review over deportation orders. Congress, acting on guidance from the Court, eliminated habeas review by providing an "adequate" substitute, such as judicial review in the court of appeals. St. Cyr, 533 U.S. at 314 n.38. Congress gave "every alien a fair opportunity to obtain judicial review." 151 Cong. Rec. 2813-01, 2873 (May 3, 2005). "[N]o alien, not even criminal aliens, will be deprived of judicial review." *Id.* An "adequate and effective" alternative to habeas corpus was to "give every alien one day in the court of appeals, satisfying constitutional concerns." *Id.*; see Alexandre v. U.S. Attorney General, 452 F.3d 1204, 1206 (11th Cir. 2006) (concluding that substituting judicial review for habeas review was an adequate substitute).

A. History of Federal Court Review of Deportation Orders

Until the enactment of the INA in 1952, habeas petitions were the sole means by which noncitizens could challenge the legality of deportation orders. St. Cyr, 533 U.S. at 306. Only aliens in detention were able to file habeas petitions. Kolkevich, 501 F.3d at 326-27.

The 1952 INA left intact the ability of detained noncitizens to seek habeas relief but also allowed noncitizens to challenge their deportation under the Administrative Procedures Act. Kolkevich, 501 F.3d at 326. In 1961, Congress amended the INA to establish a petition for review process for noncitizens similar to the procedures used for reviewing actions of other agencies. Id. at 327. Congress also specifically permitted detained noncitizens to file habeas petitions. Id.

This framework remained until 1996, when Congress stripped district courts of jurisdiction over habeas petitions challenging deportation orders and instead established petitions for review as the sole means to challenge a deportation order. Id. At the same time, Congress restricted judicial review over certain issues and categories of aliens, such as

criminal aliens. Id.; 8 U.S.C. § 1252(a)(2)(C). The Court found that eliminating all forms of federal court review for criminal aliens would implicate the Suspension Clause. St. Cyr, 533 U.S. at 305. To avoid this problem, the Court found that criminal aliens retained the ability to file habeas petitions. Id. at 305-14.

Thus, criminal aliens had two opportunities at federal court review, the habeas petition and a subsequent appeal, while noncriminal aliens had only one opportunity, a petition for review. Congress sought to eliminate the disparity between the treatment of criminal and non-criminal aliens in the RIDA. Kolkevich, 510 F.3d at 328. Congress wanted all noncitizens to have a single bite at the apple. 151 Cong. Rec. 2813-01, 2873 (May 3, 2005).

To accomplish this goal, Congress amended the INA to preclude habeas review of deportation orders but to allow criminal aliens to raise legal or constitutional questions via a petition for review. 8 U.S.C. § 1252(a)(5). Congress provided for the transfer of habeas petitions pending on the RIDA's effect date, May 11, 2005, to a circuit court of appeals. RIDA § 106(c).

Despite its stated intention, Congress overlooked the situation of noncitizens such as Mr. Gjidoda. When Mr. Gjidoda filed his timely petition for review, the Sixth Circuit properly dismissed it because his conviction for a crime involving moral turpitude deprived it of jurisdiction. Gjidoda, *supra*, 48 Fed. Appx. at *1-2 (App. E1). At the time, there was no time limit for filing a habeas petition. Moreover, Mr. Gjidoda was not detained. With the enactment of the RIDA, Mr. Gjidoda seemingly lost his ability to file a habeas petition while at the same time he became time barred from filing a petition for review. A strict reading of the RIDA has the unintended consequence of depriving Mr. Gjidoda of habeas review without providing an adequate, let alone any, substitute.

B. Congress Intended to Provide Federal Court Review

There is a strong presumption in favor of judicial review and a longstanding requirement of a clear statement of Congressional intent to repeal habeas jurisdiction. St. Cyr, 533 U.S. at 298. The RIDA lacks a specific and unambiguous statutory directive sufficient to communicate congressional intent to completely deprive Mr. Gjidoda of all federal court review. Kolkevich, 510 F.3d at 334.

Although RIDA § 106(b) states that it applies to all final orders of deportation regardless of when they were entered, it does not address habeas corpus, the Suspension Clause, or judicial review. Kolkevich, 501 F.3d at 334-35. There is a patchwork of different statutes, not a clear indication of congressional intent. Kolkevich, 501 F.3d at 335.

The RIDA's legislative history evidences the intent, not to deprive aliens of review, but to ensure that all aliens have an equal opportunity to have their claims heard in a federal court. Id. Congress intended for the RIDA to "give every alien a fair opportunity to obtain judicial review." 151 Cong. Rec. 2813-01, 2873 (May 3, 2005). "[N]o alien, not even criminal aliens, will be deprived of judicial review." *Id.* An "adequate and effective" alternative to habeas corpus was to "give every alien one day in the court of appeals, satisfying constitutional concerns." *Id.*

Congress was aware that the complete elimination of habeas review without providing an adequate alternative would raise Suspension Clause problems. St. Cyr, 533 U.S. at 314 n.38; 151 Cong. Rec. 2813-01, 2873. Thus, the RIDA lacks

any clear indication that Congress "intended to risk running afoul of the Suspension Clause by suspending the writ of habeas corpus with respect to the small class of aliens who received final orders of removal more than 30 days prior to the enactment of" the RIDA. Kolkevich, 501 F.3d at 335.

C. Elimination of Federal Court Review in this Case Violates the Suspension Clause

The Suspension Clause provides that the "Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2. This clause requires some judicial intervention in deportation cases. St. Cyr, 533 U.S. at 300. "[G]iven the serious constitutional problems raised by a total preclusion of review, the courts must construe the INA, whenever possible, to preserve judicial review." Id.

The writ of habeas corpus is a "vital instrument to secure freedom." Boumediene v. Bush, 128 S. Ct. 2229, 2244 (2008). So important and necessary is the protection provided by the writ that its availability is guaranteed by the Constitution. An adequate substitute for habeas

review must provide the petitioner with an opportunity to demonstrate that he is being detained pursuant to an erroneous application or interpretation of the law and the reviewing court must have the authority to correct those errors. See id. at 2266.

The decisions below would leave a small group of aliens, including Mr. Gjidoda, without any avenue for challenging their deportation orders. These aliens are subject to deportation orders entered more than 30 days before the enactment of the RIDA, did not have habeas petitions pending on the date of enactment, and they never had an opportunity to have their challenges heard on the merits.

Before the RIDA's enactment, these aliens could have filed habeas petitions once they were in custody because there was no time limit on filing the petition. Medellin-Reyes v. Gonzales, 435 F.3d 721, 723 (7th Cir. 2006). The enactment of the RIDA, with no notice or grace period, essentially retroactively deprived these noncitizens of the ability to file a habeas petition without providing an adequate alternative. Before the RIDA's enactment, they could not file a petition for review because, as this case demonstrates, the circuit

courts lacked jurisdiction over petitions for review filed by criminal aliens. 8 U.S.C. § 1252(a)(2)(C); Gjidoda, 48 Fed. Appx. at *1-2 (App. E1). When Congress enacted the RIDA, it was already too late to file a petition for review because more than 30 days had passed since the BIA's decision. 8 U.S.C. § 1252(b)(1).

Habeas Corpus, the "Great Writ," is the "fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action." Harris v. Nelson, 394 U.S. 286, 290-92 (1969). The First Circuit found "colorable" a claim that the REAL ID Act violated the Suspension Clause. Peguero-Cruz v. Gonzales, 500 F.3d 358, 361 n.4 (1st Cir. 2007). The court declined to address the issue because the alien did not raise it, but invited future litigants to raise the issue. Id.

The Second, Third, and Ninth Circuit have applied the RIDA to not run afoul of the Suspension Clause. Singh, 533 F.3d at 1107; Kolkevich, 501 F.3d at 335. These circuits adopted a "grace period" of thirty days from the enactment of the RIDA. Singh, 533 F.3d at 1109; Ruiz-Martinez, 516 F.3d at 117; Kolkevich, 501 F.3d at 337.

Creating a retroactive grace period that has already expired does nothing to remedy the Suspension Clause violation. In any event, Mr. Gjidoda filed a timely petition for review in 2001, but the Court dismissed it on jurisdictional grounds that have since been eliminated.

Mr. Gjidoda diligently pursued his claims. He filed a timely petition for review but the Sixth Circuit lacked jurisdiction over it at the time. That left him with a petition for writ of habeas corpus as the only means for challenging the legality of the BIA's decision. Because there was no time limit for filing a habeas petition, he could wait until he was physically detained before filing the petition.

Elimination of habeas review over Mr. Gjidoda's claim, without providing an adequate alternative, violates the Suspension Clause. The dismissal of his habeas petition was in error.

CONCLUSION

Petitioner respectfully submits that the Sixth Circuit erred in the following respects:

Congress did not intend to deprive Petitioner of review over the legality of the agency's deportation order. The retroactive elimination of all federal court review violates the Suspension Clause.

Therefore, Petitioner respectfully prays that the Court grant his petition for writ of certiorari and reverse the decision of the Sixth Circuit Court of Appeals.

Respectfully Submitted,

Marshal E. Hyman
Counsel of Record
Russell Reid Abrutyn

APPENDIX

6TH CIRCUIT:

Order,
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EASTERN DISTRICT OF MICHIGAN FILINGS:

Judgment of Dismissal,
filed 05/30/07 ..... B1 - B1

Decision of the Board of
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filed 08/17/06 ..... C1 - C10

Decision and Order
Immigration Judge,
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filed 08/17/06 ..... E1 - E9

NOT RECOMMENDED FOR
FULL-TEXT PUBLICATION

No. 07-1769

UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

MARTIN GJIDODA,
Petitioner-Appellant,

v.

ROBIN BAKER, Field Office Director, Immigration and Customs Enforcement; JULIE L. MYERS, Assistant Secretary for Immigration and Customs Enforcement; MICHAEL CHERTOFF, Secretary, Department of Homeland Security,
Respondents-Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF MICHIGAN

ORDER

Before: DAUGHTREY and MCKEAGUE, Circuit Judges; VAN TATENHOVE, District Judge.*

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*The Honorable Gregory Van Tatenhove, United States District Judge for the Eastern District of

Martin Gjidoda, represented by counsel, appeals a district court judgment denying his petition for a writ of habeas corpus filed under 28 U.S.C. § 2241. The parties have expressly waived oral argument, and this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Gjidoda entered the United States in 1985 from Yugoslavia on a visitor's visa. At the time of his entry, he had completed a twenty-year prison sentence for the shooting death of his wife, in Yugoslavia. He was married after entry and has two children who are citizens of the United States. In 1995, Gjidoda filed an application seeking an adjustment of status. The Immigration and Naturalization Service (INS) denied the application, and issued Gjidodaan order to show cause why he should not be deported. The show cause order relied on §§ 241(a)(1)(A) and (B) of the Immigration and Nationality Act (INA), 8 U.S.C. §§ 1251(a)(1)(A) and (B), which provides for deportation of aliens excludable at the time of entry and of aliens who entered without inspection. Furthermore, § 212(a)

Kentucky, sitting by designation.

(2)(A)(i)(I) of the INA, 8 U.S.C. § 1182(a)(2)(A)(i)(I), provides that an "alien convicted of, or who admits committing ... acts which constitute the essential elements of ... a crime involving moral turpitude" is inadmissible.

At a hearing before an immigration judge (IJ), evidence was introduced in support of Gjidoda's Yugoslavian conviction. The IJ concluded that a conviction for a crime of moral turpitude had been established, and that Gjidoda was ineligible for a waiver of inadmissibility under INA § 212(h), because he had been convicted of an aggravated felony as set forth in 8 U.S.C. § 1182(h). On April 22, 2002, the Board ofImmigration Appeals (BIA) rejected the IJ' s conclusion that Gjidoda was ineligible to apply for a § 212(h) waiver because the aggravated felony bar in § 1182(h) applies only to aliens who has been admitted to lawful permanent residence and Gjidoda was not a permanent resident. However, thc BIA concluded that Gjidoda was ineligible for § 212(h) relief because was convicted of murder.

Gjidoda petitioned this court for review of the BIA's decision. A panel of this court dismissed the petition for review, concluding that it lacked jurisdiction over Gjidoda's petition because he had been convicted ofa crime of moral turpitude. *Gjidoda*

v. Ashcroft, 48 F. App'x 982 (6th Cir. 2002). The court did not address the BIA's finding that Gjidoda had been convicted of murder.

On August 17,2006, Gjidoda filed his habeas petition in the district court, arguing that the BIA erred when it concluded that his Yugoslavian conviction constituted a conviction for murder. The district court dismissed the petition for lack of jurisdiction pursuant to the REAL ID Act's (RIDA) jurisdictional amendments.

Gjidoda has filed a timely appeal, essentially arguing that: 1) the district court did have jurisdiction to review his habeas petition and such review was required by the Suspension Clause; 2) the BIA erroneously concluded that he was convicted of "murder;" and 3) he is eligible for a waiver of inadmissibility.

Upon review, we conclude that the district court properly dismissed Gjidoda's § 2241 petition for lack of jurisdiction. Gjidoda's 28 U.S.C. § 2241 petition was filed in August 2006, after the RIDA was enacted in May 2005. The RIDA provides, in part, that a petition for review in a federal appellate court is "the sole and exclusive means of judicial review" for most orders of removal. See 8 U.S.C. § 1252(a)(5). Section 106(c) of the RIDA provides that all habeas

petitions brought by aliens that challenge a final order of removal and that were pending in the district courts on the date the RIDA became effective "[were] to be transferred to the appropriate courts of appeals and converted to petitions for review." Thus, the RIDA eliminated habeas petitions as a means for judicial review of a removal order. *See Jaber v. Gonzales*, 486 F.3d 223,230 (6th Cir. 2007); *Kellici v. Gonzales*, 472 F.3d 416,419 (6th Cir. 2006).

Contrary to Gjidoda's argument, the RIDA does not violate the Suspension Clause. The RIDA is not an unconstitutional suspension of the writ because the new statutory scheme provides an "adequate substitute" by allowing judicial review of the final order of removal through the courts of appeals. *See Mohamed v. Gonzales*, 477 F.3d 522, 526 (8th Cir. 2007); *Puri v. Gonzales*, 464 F.3d 1038,1042 (9th Cir. 2006); *Alexandre v. U.S. Att'y Gen.*, 452 F.3d 1204,1206 (11th Cir. 2006). Although Gjidoda argues that he has been denied the opportunity to challenge the BIA' s erroneous deportation order, his argument ignores the fact that he chose to wait to pursue his claims. Indeed, Gjidoda waited approximately three years after this court affirmed the BIA' s decision and over a year after the enactment of the RIDA before filing his habeas petition. He cannot be heard to

argue that the RIDA now improperly bars his claims, when he failed to diligently pursue them when the opportunity was available. *See De Ping Wang v. Dep't of Home land Sec.*, 484 F .3d 615, 618 (2d Cir. 2007) (application of the RillA raised no Suspension Clause concerns because the alien "failed to challenge his final order of removal for almost four years .... ").

Gjidoda's remaining claims are not subject to review because the district court dismissed the habeas petition for lack of jurisdiction and did not reach the merits of the BIA's decision.

Accordingly, we affirm the district court's judgment.

ENTERED BY ORDER OF THE COURT

/s Leonard Green
Leonard Green
Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARTIN GJIDODA,
Petitioner,
vs. Civil No. 06-13654

ROBIN BAKER, Field Office Director,
U.S. Immigration and Customs
Enforcement, et al.,
Respondents.

HON. ARTHUR J. TARNOW

JUDGMENT OF DISMISSAL

The petition for writ of habeas corpus in this case is dismissed since the court lacks jurisdiction over the removal order in question due to the enactment of the REAL ID Act of 2005, Pub.L.No. 109-13, 119 Stat. 231 (2005).

/s/ Arthur J. Tarnow
ARTHUR J. TARNOW
United States District Judge

Date: 5/30/07

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION
REVIEW IMMIGRATION COURT
Detroit, Michigan

File No.: A 27 455 915 July 27, 1999

In the Matter of

MARTIN GJIDODA,
Respondent

IN DEPORTATION PROCEEDINGS

CHARGE: Section 241 (a) (1) (A) of the Immigration & Nationality Act as amended - conviction of a crime involving moral turpitude. Section 241 (a) (1) (B) of the Immigration & Nationality Act, as amended remained longer after admission as a non-immigrant.

APPLICATIONS: Section 245 of the Immigration and Nationality Act, as amended - adjustment of status.

ON BEHALF OF RESPONDENT:
Fakhri Yono, Esquire
32255 Northwestern Hwy
Suite 251
Farmington Hills, MI 48334

ON BEHALF OF SERVICE:
Kathleen L. Alcorn
Assistant District counsel,
333 Mount Elliot
Detroit, MI 48207

DECISION OF THE IMMIGRATION JUDGE

The respondent is a 57-year-old male, native and citizen of the Federal Republic of Yugoslavia who entered the United states on or about March 16, 1985, as a non-immigrant visitor.

The Immigration and Naturalization Service commenced these proceedings by a filing of an Order To Show Cause with the Court on February 5, 1996. The Order To Show Cause charges the respondent with being subject to removal pursuant to section 241 (a) (1) (A) of the Immigration and Nationality Act. And, section 241(a) (1) (B) of the Immigration and Nationality Act (here and after "the Act").[1]

---

[1]These proceedings were commenced prior to the effective date of the Illegal Immigration Reform and

At a hearing before the Court, the respondent acknowledged receipt of the Order To Show Cause, dated August 30, 1995. The respondent admitted allegations one, two, three, four and six contained on the Order To Show Cause, and conceded deportability pursuant to Section 241 (a) (1) (B) of the Act. Deportability under Section 241 (a) (1) (A) of the Act were denied. At a subsequent period, the immigration and Naturalization Service (here and after "the Service") submitted an additional allegation of fact (Exhibit 2) which has been admitted by respondent, through Counsel. This indicates at this admission, was that the respondent was convicted for the crime of murder in Yugoslavia and served 16 years in prison. See Exhibit 2.

The Government has submitted copies of correspondence by virtue of facts and letters to the American embassy in Belgrade; counsel for the respondent: and the officer in charge at the INS office in Vienna, Austria, concerning the respondent's case.

Immigrant Responsibility Act of 1996, public file 104-207, 1110 statutes 3009, (1996). And. the citations to the Act set forth herein refer to the Act as it existed prior to the amendments, effective upon adoption of the IIRAIRA.

See Exhibit 7. Moreover, Government Counsel has submitted copies of the decision on the respondent's application for status as a permanent resident, made by the Service on August 30, 1995 (Exhibit 4) and a memorandum of the District adjudication officer (Exhibit 5) reflecting admissions made by the respondent during the course of that interview. Also submitted, is a copy of the application for adjustment of status and supporting documentation, including a copy of an affidavit submitted by counsel for the respondent to the Service, dated August 22, 1995, reflecting incidents surrounding the events underlying this conviction. See Exhibit 4, 5 and 6.

In determining whether or not a crime involving moral turpitude exists, the Court must look to the inherent nature of the crime as it is defined by the statute under which the conviction was entered, as well as any available interpretations by the Court as limited and described in the record of conviction. What the Judge does not look to, is the facts and circumstances of the particular case involved. Matter of Short, 20 I&N Dec, 136 (BIA 1989) .

The focus, in other words, is on the elements of the offense and not the details of the criminal conduct which underlies the conviction. The Court also does not consider the severity of the sentence of imposed,

or the seriousness of the offense, in reaching a conclusion relating to whether or not the conviction constitutes a crime involving moral turpitude, see Matter of Serna, 20 I&N Dec. 579 (BIA 1992) _ Before one is determined to be convicted of a crime involving moral turpitude, there is no question that the statute under which the conviction lies must necessarily involve moral turpitude. Matter of Esfandiary. 69 I&N Dec. 659 (BIA 1979), Matter of Garcia, 11 I&N Dec. 521 (BIA 1966) .

In the instant case, the respondent stands convicted of violation of the criminal code of Yugoslavia. This determination is based upon evidence submitted pursuant to a series of faxes sent to the American embassy requesting information upon a conviction for the respondent. These materials included copies of a birth record, both translation and original language, and other information relating to the case. It is clear from this record that numerous communications were made between counsel for the Government and the officials both in Vienna and Belgrade, that is, officials of the United States Government, to determine whether or not a conviction had occurred, in the case of Martin Gjidoda born in Bardosane (phonetic sp.) near Jakovita (phonetic sp.) an June 8, 1942. Indeed, a

diplomatic note was sent from the embassy of the United States, to the Federal Ministry of Foreign Affairs with an official request, requesting the assistance of the Ministry in obtaining his criminal records. See Exhibit 7 at tab 18. In response to that request, the Ministry sent a communication numbered 510106/4-98 to the embassy of the United States, specifically referencing the diplomatic note sent, and stated that the respondent was sentenced to 20 years imprisonment at hard labor by a court in Pee on December 5, 1973, for criminal acts under article 135, paragraphs one and two of the penal code of the former or Federal Republic of Yugoslavia. See Exhibit 7 at tab 19.

The Court notes that the conviction record submitted in this case is a statement of a foreign government reflecting the violation. Congress has defined a conviction and the Attorney General has included evidence or regulations; indicating that the Court can consider a variety of items as evidencing a conviction. These include, but are not limited to, certified records of the court in which the conviction lay, evidence from custodians of records for official enforcement agencies, and finally, any evidence which is reliable in determining whether or not a conviction exists. In the instant case, the Court notes

that the Government has provided ample foundation which would reasonably indicate the existence of a criminal conviction. That is, evidence provided pursuant to diplomatic note which was submitted to the Government of the country where the conviction occurred, and an official response evidencing that note from the Ministry of Foreign Affairs of that Government. As such, the Court must find that this is other evidence reasonably existing or indicating the existence of a criminal conviction. See 8 CFR 3.41(d).

Having reached the conclusion that the respondent has been convicted under article 135 Sections 1 and 2 of the penal code, criminal code of Yugoslavia, the Court turns to the conviction itself to determine whether, the record of the statute, to determine whether or not it involves moral turpitude. As indicated, the criminal code of Yugoslavia does contain provisions for voluntary manslaughter and negligent homicide under articles 136 and 137. Respondent was not convicted under these articles. Respondent was convicted under article 135, which provides that, under articles 1 and 2, which provides that whoever kills another, or takes another man's life, is subject to imprisonment of not less than five years and for an individual who kills another in a

cruel or perfidious manner, or who kills another and in doing so, intentionally endangers the life of another person, is subject to imprisonment of not less than ten years, or the death penalty. The record of conviction for the evidence of conviction, indicates the respondent was sentenced to 20 years for violations of these sections of article 135. It would appear that these would be, if anything, the equivalent of murder in the second degree, under the federal code, that is, 18 U.S.C., Section 1111, or voluntary mansll;iughter under 18 U.S.C. Section 1112(a). As such, the Court must find that the respondent has been convicted of a foreign, in violation of a foreign statute, which would be the equivalent of murder or voluntary manslaughter, and is therefore, convicted of a crime involving moral turpitude. It is well settled that these offenses do constitute that these offenses do constitute crimes involving moral turpitude. See e.g Carter v. INS 90 F.3d 14, 18 (1st Cir. 1996).

The respondent has requested the relief of adjustment of status under Section 245 of the Act. Having determined that the respondent has been convicted of an of.fense which is a crime involving moral turpitude, he is subject to the exclusionary provisions of the Act under section 212(a) (2) (A) (i) (I) of the former Act, and subject to removal pursuant to

Section 212(a) (2) (A) (i) (1) of the current Act. While the respondent might otherwise be considered for a waiver, although none has been requested in this case, as an individual who has been convicted of an aggravated felony, he is barred from relief under Section 212(h) of the Act. Since the respondent has been convicted of an aggravated felony under what can be considered two provisions of Section 101(a) (43) of the Act, to wit, 101 (a) (43) (A) and (F) of the Act, he is barred from such waiver.

The respondent has declined to apply for relief pursuant to the deferral of removal under the Convention Against Torture.

The respondent, having been convicted of an aggravated felony, is barred from the relief of asylum under section 208 of the Act. Since the respondent has been convicted of a particularly serious crime, under Section 243(h) for which the sentence of more than five years has been imposed, the Court, pursuant to Board precedent, must find that the respondent is barred from relief under withholding of removal under Section 243 (h).

The Court, having reached a conclusion that this conviction is the equivalent of a murder in the second degree, must find that respondent can not establish good moral character as that is defined

under Section 101(f) of the Act and will equally deny the respondent's application for relief under the provisions of section 244(e) of the Act.

For the forgoing reasons, the following order will be entered:

ORDER

IT IS ORDERED that the respondent's application for adjustment of status, be and hereby is, denied; and

IT IS FURTHER ORDERED that the respondent's application for withholding of deportation and asylum be and hereby are, denied;

IT IS FURTHER ORDERED that the respondent's application for voluntary departure, be denied, and the respondent be ordered deported to Yugoslavia on the charges contained in the Order To Show Cause.

/s/ Elizabeth A. Hacker
ELIZABETH A. HACKER
Immigration Judge

July 27, 1999

U.S. Department of Justice
Decision of the Board of Immigration Appeals
Executive Office for Immigration Review

Falls Church, Virginia 22041

==========

File: A27 455-915 - Detroit Date: Apr. 22, 2002

In re: MARTIN GJIDODA

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS:
Richard A Kulics, Esquire

ON BEHALF OF DHS:
Edward L. Dunlay
District Counsel

CHARGE:
Order: Sec. 241(a)(1)(A), I&N Act [8 U.S.C. § 1251(a)(1)(A)) - Inadmissible at time of entry or adjustment of status under section 212(a)(2)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(I)] - Crime involving moral turpitude

Sec. 241 (a)(l)(B). I&N Act [8 U.S.C. § 1251(a)(1)(B)] In the United States in violation of law

APPLICATION: Adjustment of status

ORDER:

PER CURIAM. The respondent has appealed from an Immigration Judge's decision finding him deportable as charged and denying his request for adjustment of status. We agree with the Immigration Judge that the respondent's criminal act under Article 135, paras 1 and 2 of the Penal Code of the Former Republic of Yugoslavia (murder) for which he was sentenced to 20 years' imprisonment on December 3, 1975, is a crime of moral turpitude. and thus, establishes the respondent's deportability under section 241(a)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(1)(A), as an alien who was inadmissible at the time of entry under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(l) (crime involving moral turpitude), by clear, unequivocal. and convincing evidence as required by *Woodby v. INS,* 385 U.S. 276 (1966). No arguments presented during the hearing or on appeal would cause us to disturb this finding.

With respect to the respondent's application for adjustment of status, we agree with the Immigration Judge that the respondent's conviction requires that he must obtain a waiver of inadmissibility. However, we are unable to affirm the Immigration Judge's finding that as an alien convicted of an aggravated felony as defined in section 101 (a)(43)(A) of the Act the respondent is barred from applying for a waiver of inadmissibility under section 212(h) of the Act. In this regard, we note that the aggravated felony bar in section 212(h) of the Act only applies to aliens who have been lawfully admitted for permanent residence. Since the respondent is not a lawful permanent resident of this country, the aggravated felony bar does not apply. Nevertheless, section 212(h) relief is not available to an alien who bas been convicted of or who has admitted committing the acts that constitute murder. *See* section 212(h) of the Act. It is clear that the respondent falls within the scope of this prohibition, and thus we find that the respondent is barred from section 212(h) relief on this basis. Since the respondent cannot establish his eligibility fur a waiver of in admissibility, we affirm the Immigration Judge's finding that he is statutorily ineligible for adjustment of status.

Finally, the respondent claims in his Notice of Appeal, that "since he was incarcerated in the Yugoslavia, an issue as to his eligibility for deferral of deportation under Article 3 of the Convention Against Torture has been raised. We note that the burden is on the respondent to establish his eligibility for this form of relief. *See* 8 C.F.R § 208. 16(c)(2) (2001). However, the respondent has not presented any evidence on appeal or below which would warrant a remand to consider whether it is more likely than not that he would be tortured if returned to the proposed country of deportation. *Id.*

Accordingly, the Immigration Judge's decision is affirmed as modified above. and the appeal is dismissed.

/s/ Marry Dunne
FOR THE BOARD

48 Fed.Appx. 982, 2002 WL 31388782 (C.A.6)

This case was not selected for publication in the Federal Reporter.

NOT RECOMMENDED FOR FULL--TEXT PUBLICATION

Sixth Circuit Rule 28(g) limits citation to specific situations. Please see Rule 28(g) before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

Please use FIND to look at the applicable circuit court rule before citing this opinion. Sixth Circuit Rule 28(g). (FIND CTA6 Rule 28.)

United States Court of Appeals, Sixth Circuit.

Martin **GJIDODA**,

Petitioner,

v.

John ASHCROFT, Attorney General; Carol Jenifer, District Director, United States Immigration and Naturalization Service, Detroit District,

Respondents.

No. 02-3556.

Oct. 22, 2002.

Alien who entered United States from Yugoslavia after serving prison sentence for shooting death of his wife sought review of a decision of the Board of Immigration Appeals (BIA) that affirmed a decision finding him deportable and ineligible for a waiver of inadmissibility based on his crime of moral turpitude. Immigration and Naturalization Service (INS) moved to dismiss petition for review. The Court of Appeals held that evidence of alien's conviction for the shooting death of his wife was sufficiently established, and thus BIA decision finding alien deportable would be upheld.

Motion to dismiss granted.

West Headnotes

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24 Aliens, Immigration, and Citizenship
24V Denial of Admission and Removal
24V(C) Removal or Deportation; Grounds
24k270 Crime and Related Grounds
24k278 k. Firearms Offenses. Most Cited Cases
(Formerly 24k53.2(2))

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⇔320

24 Aliens, Immigration, and Citizenship KeyCite Citing References for this Headnote
24V Denial of Admission and Removal
24V(D) Relief from Denial of Admission or Removal in General
24k319 Commission of Crime as Basis for Denial of Relief
24k320 k. In General. Most Cited Cases
(Formerly 24k53.2(2))

Evidence of alien's conviction for the shooting death of his wife was sufficiently established, even though no court record was introduced into evidence, where immigration judge reviewed numerous communications between officials for United States and Yugoslavian governments and examined the provisions of the penal code under which alien was convicted and concluded that offenses under that section were crimes of moral turpitude; thus, decision of Board of Immigration Appeals (BIA) finding alien deportable and ineligible for a waiver of inadmissibility based on his crime of moral turpitude would be upheld. Immigration and Nationality Act, § 212(a)(2)(A)(i)(I), 8 U.S.C.A. § 1182(a)(2)(A)(i)(I); 8 C.F.R. § 3.41.

*982 Before BOGGS, SUHRHEINRICH, and CLAY, Circuit Judges.

**1 The petitioner seeks review of a decision of the Board of Immigration Appeals (BIA) that affirms a decision finding him deportable and ineligible for a waiver of inadmissibility. After he had filed a proof brief with the clerk of this court, the respondents moved to dismiss the petition for review. They argue that review is barred pursuant to 8 U.S.C. § 1252 because the petitioner is inadmissible due to his conviction for a crime of moral turpitude. The petitioner responds in opposition.

The petitioner entered the United States in 1985 from Yugoslavia on a visitor's visa. At the time of his entry, he had completed a prison sentence for the shooting death of his wife. He was married after entry and has two children who are citizens of the United States. An initial application for an adjustment of status was not fully processed, the file apparently becoming lost. In 1995, the petitioner again sought an adjustment of status. In response, the Immigration and Naturalization Service (INS) issued the petitioner an order to show cause why he should not be deported. The show cause order relied on §§ 241(a)(1)(A) and (B) of the Immigration and

Nationality Act (INA), *983 8 U.S.C. § § 1251(a)(1)(A) and (B),FN1 which provides for deportation of aliens excludable at the time of entry and of aliens who entered without inspection. In turn, § 212(a)(2)(A)(i)(I) of the INA, 8 U.S.C. § 1182(a)(2)(A)(i)(I), provides that an "alien convicted of, or who admits committing ... acts which constitute the essential elements of ... a crime involving moral turpitude" is inadmissible.

> FN1. Renumbered and transferred to 8 U.S.C. § 1227 by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub.L. 104-208, Div. C, Title III, § 305(a)(2).

At a hearing before an immigration judge, evidence was introduced in support of the petitioner's conviction. The judge concluded that a conviction for a crime of moral turpitude had been established. He held that the petitioner was inadmissible, and therefore deportable, and denied the application for a adjustment of status. The BIA affirmed.

This petition for review is governed by the transitional rules included within the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub.L. 104-208, Div. C, Title

III. The removal proceedings were commenced prior to April 1, 1997, and the final order of removal (the BIA decision) was entered after October 30, 1996. See §§ 309(c)(1) and (4), IIRIRA. The transitional rules provide that "there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in section 212(a)(2) [8 U.S.C. § 1182(a)(2)]... of the Immigration and Nationality Act ...." § 309(c)(4)(G). IIRIRA. Section 212(a)(2), as noted above, includes conviction for a crime of moral turpitude. This court has upheld the jurisdiction-stripping provision of § 309(c)(4)(G) and applied the bar to cases falling within its parameters. Pulice v. Immigration and Naturalization Service, 218 F.3d 505 (6th Cir.2000). The INS moves to dismiss pursuant to § 309(c)(4)(G) and argues that the petitioner's conviction precludes this appeal.

**2 As a general principle, "it is familiar law that a federal court always has jurisdiction to examine its own jurisdiction." United States v. Ruiz, 536 U.S. 622, ----, 122 S.Ct. 2450, 2454, 153 L.Ed.2d 586 (2002). A number of circuits have agreed that in the immigration context, the court of appeals can determine whether the crimes asserted to be the

jurisdictional bar are within the meaning of the statute. Yousefi v. Immigration and Naturalization Service, 260 F.3d 318 (4th Cir.2001); Okoro v. Immigration and Naturalization Service, 125 F.3d 920 (5th Cir.1997) (can examine if crimes are of moral turpitude); Yang v. Immigration and Naturalization Service, 109 F.3d 1185, 1192 (7th Cir.1997). The Supreme Court has not specifically addressed the issue. Calcano-Martinez v. Immigration and Naturalization Service, 533 U.S. 348, 121 S.Ct. 2268, 150 L.Ed.2d 392 (2001).

In response to the motion to dismiss, the petitioner states his appeal challenges the whether a conviction for a crime of moral turpitude was established. This being a jurisdictional fact, he suggests, this appeal should proceed. However, upon review of the petitioner's proof brief filed with the court, we conclude that the appeal must be dismissed.

The petitioner argues the INS failed to establish his conviction because no court record was introduced. However, in a proceeding before an immigration judge, a criminal conviction may be established by evidence other than the actual record of conviction. See 8 C.F.R. § 3.41. For instance, "an abstract of a

record of conviction prepared ... by a state official associated with the state's repository of criminal justice records, that indicates the following: The charge or section of law violated, *984 the disposition of the case, the existence and date of conviction, and the sentence" will establish the conviction. 8 C.F.R. § 3.41(a)(5). Further, "[a]ny other evidence that reasonably indicates the existence of a criminal conviction may be admissible as evidence thereof." 8 C.F.R. § 3.41(d). The immigration judge reviewed numerous communications between officials for both the United States and Yugoslavian governments and found them to be sufficient evidence of conviction. The BIA affirmed. We can find no basis for finding these conclusions in error.

Further, the immigration judge examined the provisions of the penal code under which the petitioner was convicted and concluded that offenses under that section are crimes of moral turpitude. The petitioner presents no convincing argument to the contrary.

Therefore, the motion to dismiss this petition for review hereby is GRANTED.

C.A.6,2002.
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No. 08-697

In the Supreme Court of the United States

MARTIN GJIDODA, PETITIONER

v.

ROBIN BAKER, FIELD OFFICE DIRECTOR, IMMIGRATION AND CUSTOMS ENFORCEMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 302, permissibly divested the district court of jurisdiction to consider petitioner's petition for a writ of habeas corpus.

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In the Supreme Court of the United States

No. 08-697

MARTIN GJIDODA, PETITIONER

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ROBIN BAKER, FIELD OFFICE DIRECTOR, IMMIGRATION AND CUSTOMS ENFORCEMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A6) is unreported. An earlier opinion of the court of appeals (Pet. App. E1-E9) is not published in the *Federal Reporter* but is reprinted in 48 Fed. Appx. 982. The judgment of the district court (Pet. App. B1) is unreported. The decisions of the Board of Immigration Appeals (Pet. App. D1-D4) and the immigration judge (Pet. App. C1-C10) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 21, 2008. The petition for a writ of certiorari was filed on November 19, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, legal immigration into the United States is controlled by the issuance of immigrant visas abroad by consular officers acting under the authority of the Secretary of State. 8 U.S.C. 1154(b), 1201(a). Congress has also authorized the Attorney General and the Secretary of Homeland Security to relieve certain qualifying aliens who are already in the United States of the need to depart and obtain a visa through consular processing by adjusting their status to that of a lawful permanent resident. See 8 U.S.C. 1255(a); *Randall* v. *Meese*, 854 F.2d 472, 473-474 (D.C. Cir. 1988) (R.B. Ginsburg, J.), cert. denied, 491 U.S. 904 (1989). Adjustment of status is discretionary and is "a matter of grace, not right." *Elkins* v. *Moreno*, 435 U.S. 647, 667 (1978).

The statute authorizing the Attorney General to adjust the immigration status of an alien to that of a lawful permanent resident requires, *inter alia*, that the alien be eligible to receive an immigrant visa and be admissible to the United States for permanent residence. 8 U.S.C. 1255(a). An alien who has been convicted of, or admits having committed, a crime involving moral turpitude is inadmissible to the United States, 8 U.S.C. 1182(a)(2)(A)(i)(I), and is therefore ineligible to adjust his status. Some aliens may seek a waiver of this ground of inadmissability under 8 U.S.C. 1182(h), however, which grants the Attorney General discretion to waive the inadmissibility of certain criminal aliens if he determines that the alien's removal would result in extreme hardship to the alien's United States citizen or lawfully resident spouse, parent, or child. The Attorney General may not, however, waive the inadmissibility of an alien

"who has been convicted of (or who has admitted committing acts that constitute) murder." *Ibid.*

b. In 1961, Congress amended the INA to establish a petition for review filed in the court of appeals as the "sole and exclusive procedure" by which an alien could seek review of a final deportation order. Act of Sept. 26, 1961, Pub. L. No. 87-301, § 5(a), 75 Stat. 651 (8 U.S.C. 1105a(a) (1994)). Congress created an exception, however, stating that "any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings." § 5(a), 75 Stat. 652.

That basic framework remained in place until 1996, when Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 309(c), 110 Stat. 3009-625. AEDPA and IIRIRA limited judicial review of final orders of removal to the courts of appeals for most aliens, imposed a uniform 30-day deadline for the filing of petitions for judicial review, and appeared to eliminate all judicial review for aliens who had committed certain crimes that rendered them inadmissible or deportable. 8 U.S.C. 1252(a)(1), (2)(C), (b)(1) and (2). In *INS* v. *St. Cyr*, 533 U.S. 289, 305-314 (2001), however, this Court interpreted the 1996 Acts as not eliminating the ability of criminal aliens to seek limited habeas review in district court.

2. Petitioner is a native of the former Federal Republic of Yugoslavia. Pet. App. C2. In 1973, a Yugoslavian court sentenced petitioner to a term of 20 years of

imprisonment in connection with the death of two people, including his wife. *Id.* at C6, D2.[1]

In March 1985, having been released from prison, petitioner was admitted to the United States on a temporary visitor visa. Petitioner married after entering the United States, and he and his current wife have two United States citizen children. In 1995, petitioner filed an application for adjustment of status. On August 30, 1995, the former Immigration and Naturalization Service (INS) denied petitioner's application for adjustment of status and issued an order to show cause why he should not be removed. Pet. App. A2, C2-C3, E4.

3. a. On February 5, 1996, the INS commenced removal proceedings. Pet. App. C2, E4. Petitioner conceded removability but renewed his application for adjustment of status. *Id.* at C3, C8. A hearing was held before an immigration judge (IJ), at which evidence was introduced about petitioner's 1973 Yugoslavian conviction. *Id.* at A3.

The IJ determined that petitioner was ineligible for adjustment of status and ordered him removed. Pet. App. C1-C10. The IJ concluded that petitioner's 1973 Yugoslavian conviction had been for a crime involving moral turpitude, which rendered him inadmissible and thus required him to obtain a waiver under 8 U.S.C. 1182(h) in order to be eligible for adjustment of status. *Id.* at C8. The IJ noted that petitioner had not sought a waiver of inadmissibility under Section 1182(h), and she determined that petitioner would not have been eligible

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[1] In his habeas petition, petitioner admitted that he killed not only his wife but "her lover" as well. Pet. for Writ of Habeas Corpus ¶ 16; see *id.* Exh. F at 4 (petitioner stating that he was "convicted of killing my wife and her communist lover while in bed in my house, after her lover pulled a gun on me").

for such a waiver in any event because his 1973 offense constituted an "aggravated felony." *Id.* at C9.

b. On April 22, 2002, the Board of Immigration Appeals (BIA) affirmed the IJ's decision. Pet. App. D1-D4. The BIA agreed that petitioner's 1973 Yugoslavian conviction was for a crime involving moral turpitude. *Id.* at D2. The BIA observed that Section 1182(h)'s aggravated-felony bar applies only "in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence," 8 U.S.C. 1182(h), and it concluded that, because petitioner "is not a lawful permanent resident of this country, the aggravated felony bar does not apply." Pet. App. D3. The BIA determined, however, that petitioner was nonetheless ineligible for a Section 1182(h) waiver because it was "clear" that he "f[ell] within the scope of th[e] prohibition" (*ibid.*) on granting waivers to aliens "who ha[ve] been convicted of (or who ha[ve] admitted committing acts that constitute) murder." 8 U.S.C. 1182(h).

c. Petitioner filed a petition for review with the court of appeals. Pet. App. E4. Because petitioner's removal proceedings were commenced before April 1, 1997, and the final order of removal was entered after October 30, 1996, the petition for judicial review was governed by IIRIRA's "transitional" rules. See IIRIRA § 309(c)(1) and (4), 110 Stat. 3009-625, 626; see Pet. App. E5-E6. Those rules provided that "there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in [8 U.S.C. § 1182(a)(2)]." IIRIRA § 309(c)(4)(G), 110 Stat. 3009-626. One of the offenses listed in Section 1182(a)(2) is "a crime involving moral turpitude." 8 U.S.C. 1182(a)(2)(A)(i)(I).

On October 22, 2002, the court of appeals dismissed the petition for review. Pet. App. E1-E9. The court recited the "general principle" that "a federal court always has jurisdiction to examine its own jurisdiction," and it observed that "[a] number of circuits have agreed that in the immigration context the court of appeals can determine whether the crimes asserted to be the jurisdictional bar are within the meaning of the statute." *Id.* at E6-E7 (quoting *United States* v. *Ruiz*, 536 U.S. 622, 628 (2002)). The court of appeals stated, however, that it could "find no basis" for rejecting the conclusions of the IJ and the BIA that the government had adequately established the existence of petitioner's 1973 Yugoslavian conviction and that the conviction was for a crime involving moral turpitude. *Id.* at E8.[2] Because it dismissed the petition for review on jurisdictional grounds, see *ibid.*, the court of appeals did not review the BIA's determination that petitioner was ineligible for a waiver of inadmissibility under 8 U.S.C. 1182(h). See Pet. App. A4.

4. a. Although he would have been eligible to do so, see *St. Cyr*, 533 U.S. at 305-314, petitioner did not file a petition for a writ of habeas corpus in an appropriate district court following the court of appeals' dismissal of his petition for review.

b. On May 11, 2005, the President signed into law the REAL ID Act of 2005 (REAL ID Act), Pub. L. No. 109-13, Div. B, 119 Stat. 302. The REAL ID Act eliminates habeas corpus jurisdiction to review orders of removal, and provides, subject to one exception not at issue here, that "the sole and exclusive means for judicial

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[2] Petitioner states that he "is not challenging the classification of his conviction as one that involves moral turpitude." Pet. 7 n.3.

review of an order of removal" is by way of a timely filed petition for review in the appropriate court of appeals. § 106(a)(1), 119 Stat. 310 (8 U.S.C. 1252(a)(5)); see § 106(a)(1)(A)(i) and (ii), 119 Stat. 310 (making similar amendments to 8 U.S.C. 1252(a)(2)(A), (B) and (C)). The REAL ID Act further provides that an alien whose criminal convictions previously operated to preclude judicial review of an order of removal by way of a petition for review may now obtain "review of constitutional claims or questions of law" via such a petition. § 106(a)(1)(A)(iii), 119 Stat. 310 (8 U.S.C. 1252(a)(2)(D)). The REAL ID Act specifically provides that its new procedures "shall apply to cases in which the final administrative order of removal, deportation, or exclusion was issued before, on, or after the date of the enactment of this division." § 106(b), 119 Stat. 311 (8 U.S.C. 1252 note (Supp. V 2005)).

5. On August 17, 2006—nearly three years and ten months after the court of appeals dismissed his petition for judicial review and a year and three months after the REAL ID Act's enactment—petitioner filed a petition for a writ of habeas corpus in district court. Pet. App. A4. In that filing, petitioner asserted that the BIA had erred in concluding that he was ineligible for a waiver of inadmissibility under 8 U.S.C. 1182(h). *Ibid.* The district court dismissed the habeas petition for lack of subject matter jurisdiction. *Id.* at B1.

6. The court of appeals affirmed. Pet. App. A1-A6. The court explained that the REAL ID Act had "eliminated habeas petitions as a means for judicial review of a removal order." *Id.* at A5. The court agreed with other courts of appeals that the REAL ID Act's jurisdiction-stripping provisions do not constitute "an unconstitutional suspension of the writ because the new statu-

tory scheme provides an 'adequate substitute' by allowing judicial review of the final order of removal through the courts of appeals." *Ibid.* Although petitioner argued "that he ha[d] been denied the opportunity to challenge the BIA's erroneous deportation order," the court stated that petitioner's argument "ignores the fact that he chose to wait to pursue his claims." *Ibid.* Because petitioner "waited approximately three years after this court affirmed the BIA's decision and over a year after the enactment of the [REAL ID Act] before filing his habeas petition," the court of appeals held that "[h]e cannot be heard to argue that the [REAL ID Act] now improperly bars his claims." *Id.* at A5-A6. As a result, the court of appeals determined that "the merits of the BIA's decision"—that is, the BIA's conclusion that petitioner was not eligible for a discretionary waiver of inadmissibility under 8 U.S.C. 1182(h)—"are not subject to review." *Id.* at A6.

ARGUMENT

1. Petitioner contends (Pet. 15-24) that the court of appeals erred in concluding that the REAL ID Act deprived the district court of jurisdiction to consider his petition for a writ of habeas corpus. The court of appeals' decision is correct and does not conflict with the decisions of any other court of appeals. In addition, the specific question presented here has no prospective importance and concerns only a limited group of criminal aliens. Further review is therefore unwarranted.

a. As the courts of appeals have uniformly held, the REAL ID Act "unequivocally eliminates habeas corpus review of orders of removal," *Marquez-Almanzar* v. *INS*, 418 F.3d 210, 215 (2d Cir. 2005), replacing that avenue of review with a right to petition for review in a

court of appeals.[3] See 8 U.S.C. 1252(a)(5). The REAL ID Act thus "takes away no substantive right but simply changes the tribunal that is to hear the case." *Hallowell* v. *Commons*, 239 U.S. 506, 508 (1916).

Petitioner does not dispute the court of appeals' general conclusion that the REAL ID Act "eliminate[s] habeas petitions as a means for judicial review of a removal order." Pet. App. A5. Instead, he asserts that Congress "overlooked" (Pet. 19) the situation of aliens, such as himself, who were previously ineligible to file a petition for review but whose orders of removal became final more than 30 days before the REAL ID Act took effect. Because petitioner is now time-barred from filing a petition for judicial review, he argues that the REAL ID Act should be construed to permit his habeas petition to proceed.

Petitioner's arguments are meritless. The REAL ID Act specifically identifies one—and only one—discrete category of aliens who are to be excused from compliance with the newly applicable requirement that the only way to obtain judicial review of a final order of removal is via the filing of a timely petition for review in the appropriate court of appeals. In Section 106(c) of the REAL ID Act, Congress provided that all habeas petitions filed by aliens challenging a final order of removal that were pending in the district courts on the date of its enactment "shall [be] transfer[ed] * * * to the court of appeals for the circuit in which a petition for review could have been properly filed under [8 U.S.C.

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[3] See *Kolkevich* v. *Attorney Gen.*, 501 F.3d 323, 329 (3d Cir. 2007); *Jama* v. *Gonzales*, 431 F.3d 230, 232 (5th Cir. 2005); *Gittens* v. *Menifee*, 428 F.3d 382, 384 (2d Cir. 2005); *Ishak* v. *Gonzales*, 422 F.3d 22, 29 (1st Cir. 2005); *Alvarez-Barajas* v. *Gonzales*, 418 F.3d 1050, 1051 (9th Cir. 2005).

1252 or 8 U.S.C. 1101 note]," where they shall thereafter be treated as timely filed petitions for review. § 106(c) 119 Stat. 311 (8 U.S.C. 1252 note (Supp. V 2005)). Petitioner does not fall within that category, however, because he did not have a pending habeas petition on the date of the REAL ID Act's enactment. In fact, petitioner failed to file his habeas petition until a year and three months *after* the REAL ID Act took effect.

Petitioner also asserts (Pet. 19) that "[a] strict reading of" the REAL ID Act has the effect of "depriving [him] of habeas review without providing an adequate, let alone any, substitute." Several statements in the petition for a writ of certiorari could be taken to suggest that petitioner *could not have* filed a petition for a writ of habeas corpus before the REAL ID Act was enacted because he was not "in the physical custody of" the Department of Homeland Security (DHS) at that time. Pet. 1, see Pet. 19, 24. As petitioner elsewhere acknowledges (Pet. 7), however, he "could have challenged the BIA's decision through a petition for a writ of habeas corpus" as soon as the court of appeals dismissed his petition for judicial review for lack of jurisdiction in 2002. Accord *Mustata* v. *United States Dep't of Justice*, 179 F.3d 1017, 1021 n.4 (6th Cir. 1999) (stating that the issuance of a final order of removal is sufficient to render an alien "in custody" for purposes of 28 U.S.C. 2241, regardless of whether the alien is physically detained); see *Simmonds* v. *INS*, 326 F.3d 351, 354-355 (2d Cir. 2003) (same); *Aguilera* v. *Kirkpatrick*, 241 F.3d 1286, 1291 (10th Cir. 2001) (same). Because the court of appeals dismissed his petition for review on October 22, 2002, and because the REAL ID Act did not take effect until May 11, 2005, there was a period of more than two-and-a-half years during which petitioner could have—

but did not—seek to obtain judicial review of his current claims by way of a petition for a writ of habeas corpus. As the court of appeals correctly observed, petitioner "cannot be heard to argue that the [REAL ID Act] now improperly bars his claims, when he failed to diligently pursue them when the opportunity was available." Pet. App. A5-A6.

Nor does this case raise any valid concerns about notice (see Pet. 22). The REAL ID Act was enacted on May 11, 2005. Despite having been "put on notice that a significant change to our immigration laws had taken place," *Kolkevich* v. *Attorney Gen.*, 501 F.3d 323, 338 n.9 (3d Cir. 2007), petitioner made no attempt to preserve his ability to seek judicial review until more than a year later. "Given that [the REAL ID Act] clearly expressed Congress's intention to cut short the filing time afforded criminal aliens under § 2241, [he] should have been aware that something was afoot." *Ibid.*; accord *Singh* v. *Mukasey*, 533 F.3d 1103, 1109 (9th Cir. 2008) ("The signing into law of [the REAL ID Act] on May 11, 2005 * * * put Singh on sufficient notice that jurisdiction over his petition now rested with the court of appeals and that he would need to act promptly to obtain review.").

b. The court of appeals' decision in this case does not conflict with the decisions of any other court of appeals. With respect to aliens (such as petitioner) who could not file a petition for judicial review prior to the REAL ID Act's enactment, the Second, Third, and Ninth Circuits have determined that it was appropriate to fashion a 30-day "grace period" from the effective date of the REAL ID Act for the filing of a petition for judicial review in the appropriate court of appeals. See *Singh*, 533 F.3d at 1108-1109 (see Pet. 8-9, 23); *Ruiz-Martinez* v. *Mukasey*,

516 F.3d 102, 117 (2d Cir. 2008) (see Pet. 9, 23), *Kolkevich*, 501 F.3d at 336-337 (see Pet. 9, 23). Petitioner, however, did not attempt to file a post-REAL ID Act petition for judicial review in the court of appeals within 30 days of the REAL ID Act's enactment. Instead, he filed a petition for a writ of habeas corpus in federal district court and he did so "over a year" (Pet. App. A5) after the REAL ID Act took effect. Petitioner has failed to demonstrate that any court would conclude that it had jurisdiction over such an action. See *Dalombo Fontes* v. *Gonzales*, 483 F.3d 115, 119-120 (1st Cir.) (refusing to recognize a post-REAL ID Act "grace period" for the filing of a petition for a writ of habeas corpus and noting that there had been a seven-month period prior to the REAL ID Act's enactment during which the alien in that case could have sought habeas relief), amended on reh'g, 498 F.3d 1 (1st Cir. 2007), cert. denied, 128 S. Ct. 2473 (2008).[4]

c. Certiorari is also unwarranted because the threshold jurisdictional issue is not one of any prospective

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[4] Petitioner also quotes (Pet. 23) the First Circuit's statement in *Peguero-Cruz* v. *Gonzales*, 500 F.3d 358, 361 n.4 (2007), that there was a "colorable" argument in the case before it "that applying the REAL ID Act to deprive us of jurisdiction over [the petition for review in that case] would amount to a violation of the Suspension Clause," cert. denied, 128 S. Ct. 2473 (2008). But the panel did not reach any Suspension Clause issues because it concluded that any such argument had been waived. *Ibid.* In addition, *Peguero-Cruz* involved the sort of alien contemplated in *Singh*, *Ruiz-Martinez*, and *Kolkevich*—that is, one who filed a petition for judicial review within 30 days of the REAL ID Act's enactment. See *Peguero-Cruz*, 500 F.3d at 359-361. Nor does the First Circuit's ultimate holding in *Peguero-Cruz* aid petitioner, because the panel viewed its earlier decision in *Dalombo Fontes* as "mak[ing] clear" that courts should "not carve out an additional path to judicial review where Congress has not." *Id.* at 361.

importance, and, as petitioner acknowledges (Pet. 22), the class of affected aliens is "small." As the Third Circuit has observed:

> The dearth of case law on this topic is due, undoubtedly, to the fact that these issues are pertinent only to a very narrow class of aliens. First, only criminal aliens are affected, since it is only that type of alien that had access to habeas review prior to [the Real ID Act's] enactment. Second, the pool is further reduced to those criminal aliens who, at the time [the Real ID Act] became effective, had not yet filed their habeas petitions.

Kolkevich, 501 F.3d at 330.

2. Petitioner also seeks this Court's review (Pet. 9-15) of the BIA's 2002 conclusion that he is ineligible for a waiver of inadmissibility under 8 U.S.C. 1182(h). Further review is not warranted.

a. The court of appeals did not reach the question of whether petitioner was eligible for a Section 1182(h) waiver because it concluded that the REAL ID Act deprived it of jurisdiction to consider petitioner's petition for a writ of habeas corpus. Pet. App. A6. This Court "ordinarily do[es] not decide in the first instance issues not decided below." *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 109 (2001) (per curiam) (citation omitted). In addition, this Court could not reach the merits of petitioner's challenge to the BIA's 2002 decision unless it were to grant review, and conclude that the court of appeals erred, with respect to the threshold jurisdictional issue. As explained previously, further review is not warranted with respect to that question.

b. In any event, petitioner's challenges to the BIA's 2002 decision are entirely factbound. Petitioner likewise

does not contend that the BIA's conclusion that he is ineligible for a waiver under Section 1182(h) conflicts with any decision of this Court or of a court of appeals.

c. Petitioner's challenges to the BIA's 2002 decision are also without merit. As a procedural matter, petitioner claims (Pet. 9, 11) that the BIA should not have considered whether his 1973 Yugoslavian conviction was one for "murder" within the meaning of 8 U.S.C. 1182(h) but rather should have remanded the matter to the IJ.

The BIA certainly would have had discretion to order such a remand, but it was under no obligation to do so. Whether petitioner is eligible for a Section 1182(h) waiver is ultimately a legal question, and the BIA did not err in concluding that no further "findings of fact" (Pet. 11) were needed in order to resolve the issue. See Pet. App. D3 (stating that "[i]t is clear that" petitioner is ineligible for a Section 1182(h) waiver).[5] It is common for reviewing tribunals to affirm a previous decision-maker's judgment on alternative, but closely related grounds, and, as the party seeking a discretionary immigration benefit, it was petitioner's burden to demonstrate that he was eligible for a waiver of inadmissbility under Section 1182(h). See 8 C.F.R. 1240.8(d); *Matovski* v. *Gonzales*, 492 F.3d 722, 738 (6th Cir. 2007). Because the 1973 Yugoslavian conviction that formed the basis for the IJ's decision that petitioner was ineligible for a waiver under Section 1182(h) unquestionably involved petitioner's role in causing the death of two other people, petitioner cannot reasonably claim surprise that the

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[5] At any rate, although 8 C.F.R. 1003.1(d)(3)(iv) (see Pet. 11) "restrict[s] the BIA's ability to add new evidence to the record," that regulation does not "prohibit the BIA from making a factual determination * * * upon *de novo* review of the record before it." *Belortaja* v. *Gonzales*, 484 F.3d 619, 624 (2d Cir. 2007).

BIA would consider whether that conviction constituted one for "murder" under that same section.

Petitioner's claim that the BIA erroneously concluded that his 1973 conviction was for "murder" within the meaning of Section 1182(h) (Pet. 11-14) also lacks merit. By describing his 1973 offens as "a crime of passion" (Pet. 13), petitioner appears to suggest that it was more akin to manslaughter than murder. But Yugoslavia had its own version of a manslaughter statute (Article 136), which applied to killings that occurred on the "spur of the moment" due to a "fit of rage." See Pet. for Writ of Habeas Corpus, Exh. H at 79. Petitioner, however, was convicted of violating a different statute (Article 135), which an English-language exhibit to his petition for a writ of habeas corpus describes as a "murder" statute. *Ibid.*

Petitioner suggests (Pet. 14-15) that the BIA erred in relying on a foreign conviction in determining that he was ineligible for a waiver under Section 1182(h). But it is well-established that foreign convictions may constitute grounds of removability where the conduct for that conviction is deemed criminal by United States standards. *In re McNaughton*, 16 I. & N. Dec. 569, 572 (B.I.A. 1978), aff'd, 612 F.2d 457 (9th Cir. 1980); accord *In re Eslamizar*, 23 I. & N. Dec. 684, 688 & n.6 (B.I.A. 2004); see *Pasquini* v. *INS*, 557 F.2d 536, 539 (6th Cir. 1999) (interpreting statute setting forth ground of deportability for drug convictions to include foreign convictions). And to the extent that petitioner argues that the government failed to produce sufficient evidence to support the *existence* of his 1973 conviction (see Pet. 13-14), the court of appeals specifically rejected that claim before dismissing his petition for judicial review in 2002. See Pet. App. E7-E8.

d. Finally, even if petitioner were *eligible* for a discretionary waiver of inadmissibility under Section 1182(h), it is extremely unlikely that he would be granted such a waiver in light of the extremely serious nature of his 1973 Yugoslavian conviction. The pertinent regulations provide that "[t]he Attorney General, in general, will not favorably exercise discretion" to grant a Section 1182(h) waiver "in cases involving violent or dangerous crimes, except in extraordinary circumstances." 8 C.F.R. 1212.7(d). Regardless of whether the offense that led to petitioner's 1973 conviction was more akin to "murder" or "manslaughter," it was, quite clearly, a "violent or dangerous crime[]." *Ibid.* In addition, petitioner has failed to demonstrate that his removal would cause the sort of "'exceptional and extremely unusual hardship'" or implicate the kind of "national security or foreign policy considerations" that the regulations indicate may sometimes justify granting a Section 1182(h) waiver in cases where an alien has committed such a crime. *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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